MORALITY IN MEDIA, INC.
475 Riverside Drive, New York, NY 10115 • (212) 870-3222 • Fax: (212) 870-2765

DOCKET FILE COPY ORIGINAL

June 10, 1998

Office of the Secretary
Federal Communications Commission
1919 M Street N.W., Room 222
Washington, D.C. 29554

Re: M.M. Docket No. 98-35
In the Matter
of Biennial
Regulatory Review
of the Commission's
Ownership Rules
Adopted Pursuant
to Section 202 of the
telecommunications
Act of 1996

Transmitted herewith are an original and eight copies of formal Comments in the above matter.

Kindly be good enough to transmit a copy to each of the Commissioners.

Thank You

Paul J. McGeady
General Counsel

PJM/tp

No. of Copies rec'd 0+8
List A B C D E

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

1998 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996.	))))))	MM Docket No. 98-35

COMMENTS OF MORALITY IN MEDIA

I. Any Review Or Recommendation Relative to Spectrum Scarcity is not Warranted by the Congressional Mandate.

This Notice of Inquiry, as stated in its Introduction, is the first step in biennial review of the broadcast ownership and other rules as required by Section 202(h) of the Telecommunications Act of 1996 which reads as follows:

> "The Commission shall review its rules adopted pursuant to this section and all of its ownership rules...and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

We hope, in these comments, to demonstrate to the Commission that the mandate of Congress is for the FCC to study the regulations over which it has control and to repeal or modify the same if the FCC determines that they are no longer in the public interest. Congress did not give the FCC any mandate to repeal or modify any statute of the United States

nor did it give it authority to review or repeal the Licensing Law. Obviously, such would be Ultra Vires. The plain intent of the mandating statute is to repeal unnecessary regulations.

We set forth this basic, self-evident principle because this NOI is inextricably intertwined with a request to have the FCC and Commentators review the "Spectrum Scarcity" rationale with an apparent view of possible recommendations by the FCC to eliminate or modify the requirement of licensing since the reason for the same, it will be claimed, no longer exists.

While this might be a proper exercise by the FCC and Commentators in an appropriate proceeding, it is irrelevant in this proceeding or, as the latin phrase goes, "Nihil Ad Rem Pertinent" to the mandate. Licensing is statutory. Congress did not ask the FCC to review any statutory provisions with a view to repeal or modify the same. It did not authorize a review of Section 301 [47 U.S.C. 301] relative to Licensing. Section 303, outlining the General Powers of the Commission, tells the FCC it is authorized to make such regulations "not inconsistent with law".

Notwithstanding that under its 202 (h) mandate any consideration of a revision or repeal of Section 301 is ultra vires, the separate statements of Commissioners Furchgott-Roth and Powell urge the Commission (and Commentators) to review the concept of "Spectrum Scarcity". This commentator says that you have no authority to do so in this proceeding. Assume you come

to the conclusion that "Spectrum Scarcity" is no longer a problem, are you then required and authorized to repeal the statutory requirement requiring licensing? The answer is, obviously, no. If that is the conclusion then it is a waste of taxpayer's money and the time of the Commission and the staff and commentators to consider the scarcity rationale. In the frame of reference of this proceeding, it is not the business of the FCC to do so. We therefore urge the Commission to now amend its NOI to advise commentators that any discussion of elimination of statutory licensing is, as to this proceeding, not germane.

II. Spectrum Scarcity Is Alive and Well

1. Introduction

Notwithstanding our contention that consideration of Spectrum Scarcity is not germane and is unauthorized, we anticipate that various commentators will accept this invitation to go off on that tangent. In order to counter that maneuver, we propose to demonstrate that the Spectrum Scarcity Rationale still lives.

2. Government Ownership

We are indebted to Professor Matthew Spitzer's article entitled "The Constitutionality of Licensing Broadcasters" in the N.Y.U Law Review Vol. 64-pages 990 et seq. (1989) for setting forth the arguments pro and con. He, it must be said,

is in favor of rejecting the rationale.

The strongest argument for continued licensing, Professor Spitzer implies, is the government-property argument. Under that thesis he notes that proponents postulate that Title 47 declares that the United States,-not its individual citizens, owns the spectrum. Red-Lion makes clear, at 395 U.S. 389 that the government may permit use of the spectrum, but the licensee has no constitutional right to hold or retain a license to do so. Section 301 now provides for the use of channels "but not the ownership thereof". Spitzer notes that the government does not "own" print media in contrast to broadcasting.

While it is true that government "control" of the air ways does not abrogate the application of the First Amendment, that fact does not diminish its "ownership". Ownership, as Cardozo says, is a bundle of rights. In the case of the Spectrum the bundle of rights relative thereto is in the possession of Uncle Sam. He may give a license or a "permit" to the usufruct of a portion of that bundle to another, but only, as Section 301 says, "for a limited period of time". Even if the Spectrum Scarcity rationale were abandoned, the government would still retain ownership. It is not a sine qua non to justify that continued ownership even under First Amendment principles. There are many examples of government ownership outside the Broadcast field (and in the field) where the federal, state or local government retains the rights of any proprietor.

3. Fora Considerations

It is apparent without elaboration, that the government has not created a traditional or designated public forum. Even if it were a non-public forum, as Professor Spitzer says, Cornelius v. NAACP 473 U.S. 788 (1985) indicates that:

> "The court is willing to go to great lengths to avoid characterizing a government resource as a designated public forum and is willing to accept flimsy justifications for regulations of speech in a non public forum. Together, these two developments comprise substantial support for the government-property rationale- if the government owns a resource, it can do with it what it likes".

Professor Spitzer poses a hypothetical case for the Supreme Court and suggests (hypothetically) that it might hold that the "Electromagnetic Spectrum" "is a non public forum subject to whatever reasonable regulations on speech and access the government wishes to promulgate". "Clearly, licensing is a reasonable method of precluding interference...therefore the existing system of licensing...is constitutional"..."In sum, the court might hold, `the challenge to the current system of regulating broadcasting fails"'.

Professor Spitzer goes on to say "The problem in the above analysis resides within the ossified public forum doctrines".

Comment

This commentator concludes that public fora doctrine cannot successfully be utilized to defeat statutory licensing. In fact (on page 1067) Professor Spitzer states "The

constitutionality of licensing on a content-neutral basis probably can be justified by the need to perform `traffic cop of the airwaves' function."

4. Scarcity Rationale

The rationales for continued reliance on the scarcity rationale for licensing may be enumerated in an a, b, c, d format as follows:

(a) Unlike other modes of expression, radio (and T.V. and cable) inherently is not available to all. (cf. N.B.C. v. U.S.).

(b) Owing to its physical characteristics, broadcasting must be regulated and rationed by the government.

(c) Present day demand for spectrum cannot be satisfied even if it were free.

(d) Allocational scarcity can justify licensing broadcasters so as to prevent interference.

III. Other Justifications for Continued Licensing

(a) The Broadcast media have established a uniquely pervasive presence in the lives of all Americans.

(b) The citizen and children in the home are a captive audience where they cannot be adequately protected from unwanted indecent material.

(c) Those who habitually violate the the law must be prohibited from Broadcasting.

IV. Commissioner Tristani's Address to the Federal Communications Bar Association on the Scarcity Rationale

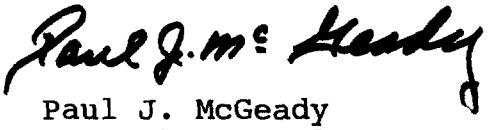
On May 21, 1998 Commissioner Tristani delivered a speech

on the scarcity rationale to the Federal Communications Bar Association. We cannot improve on it and simply append it to these comments.

V. Conclusion

Morality In Media concludes (1) That the FCC is not authorized under the Congressional Mandate to consider or request comments on the Scarcity Rationale. (2) That the Scarcity Rationale, at all events, is alive and well and (3) That if the Scarcity Rationale were jettisoned the government may constitutionally continue to require licensing.

Respectfully submitted



Paul J. McGeady
General Counsel

PJM/tp

[Text Version | WordPerfect Version]

"BROADCAST VIEWS"

SPEECH BY COMMISSIONER GLORIA TRISTANI TO THE FEDERAL COMMUNICATIONS BAR ASSOCIATION MAY 21, 1998

Thank you. It's a pleasure to be with you as your luncheon speaker. I'd like to use this opportunity to share some of my views about broadcasting. In particular, I'd like to talk about broadcasting's relationship to the public, the continued relevance of the scarcity doctrine and what the public interest might mean in today's world.

I wanted to start with a question a lot of people around Washington have been asking: why should broadcasters be treated any differently under the First Amendment than other media voices like newspapers?

The short answer is because the Supreme Court said so. In *Red Lion*, the Supreme Court said:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.(1)

The Court added: "There is no sanctuary in the First Amendment for unlimited private censorship in a medium not open to all."(2)

I know what a lot of you are probably thinking. Yeah, sure, *Red Lion*. Hasn't that case, and the whole scarcity rationale it relied on, been thoroughly discredited? Isn't *Red Lion* just one of those Warren Court relics that would never be upheld today? If you only looked at law reviews and the stuff coming out of Washington think tanks, you might think so. But apparently word of *Red Lion's* demise hasn't reached the only audience that matters -- the Supreme Court. In both the 1994 *Turner* decision and the 1997 *Reno* decision, the Court expressly reaffirmed *Red Lion* and the scarcity rationale as justifying more intrusive regulation of broadcasters than newspapers and other media. I don't think the Commission should be in the business of questioning the Court's judgment.

Nor do I think that the Court is simply waiting to overturn *Red Lion* until the Commission sends a signal that scarcity no longer exists. A very different Commission tried that back in 1987. It was a decision called *Syracuse Peace Council*. That decision argued that if scarcity was ever a valid reason to distinguish broadcasting from other media, it no longer applied. Given the explosion in broadcasting and other media outlets, the *Syracuse Peace Council* Commission called on the Supreme Court to reconsider *Red Lion* and apply the same First Amendment standard to broadcasters that applies to newspaper publishers. It's now been eleven years since the Commission declared in *Syracuse Peace Council* that scarcity was a thing of the past; thus far, there has been no evidence that the Supreme Court finds the Commission's "signal" at all persuasive. Congress, too, appears unconvinced. In the legislative history of the Children's Television Act of 1990, Congress repeatedly relied on *Red Lion* and the scarcity rationale as supporting the Act's constitutionality.(3)

The Court and Congress have stuck with the scarcity rationale for good reason. Scarcity is clearly still with us. If there's anything I've been made aware of over the last six months on the Commission, it's the

scarcity of the broadcast spectrum. There are still far more citizens who want to speak over the public airwaves than can be accommodated.

The spectrum isn't scarce? Tell that to the hundreds of low power and TV translator operators -- many of whom provide extremely valuable services to their communities -- who are being displaced by full-power broadcasters during the digital conversion.

The spectrum isn't scarce? Tell that to the people who want to operate low power radio stations and were met with an avalanche of objections by existing broadcasters that there just isn't enough room on the spectrum to accommodate them.

The spectrum isn't scarce? Tell that to the companies that are spending millions of dollars to buy existing broadcast licenses, far in excess of the value of the station's physical assets. If the spectrum isn't scarce, these companies owe their shareholders an explanation.

So scarcity is still very much with us. But those who would do away with *Red Lion* say so what? Scarcity, they say, doesn't distinguish the broadcast spectrum from other scarce economic goods. For instance, newsprint, ink, delivery trucks, and computers that go into the production of newspapers are scarce -- what makes scarcity of the broadcast spectrum different?

The difference is that broadcasting scarcity is *government created* and *government enforced*. In principle, all citizens have an equal right to speak on the public airwaves. The government could have decided to give every citizen a yearly chit, good for a pro rata share of time to broadcast. Or it could have granted licenses to private parties but required them to set aside a certain amount of capacity for public access, similar to what Congress did in the cable context. Instead, Congress decided to grant certain citizens the right to speak freely over the public airwaves and to deny all others that right.

Let me make clear that I think Congress got it exactly right. Our system of broadcasting -- relying on private entities acting under an obligation to serve the public interest -- is the finest broadcasting system in the world. But the point here is that broadcast licenses are government benefits conferred on certain citizens and not on others. It's preferential treatment. It's as if the government set up a megaphone in the park for the exclusive use of certain citizens, and then stationed a policeman next to the podium to ensure that none of the non-speakers was allowed to interfere with the selected group's exclusivity.

That's why it's confusing to me when I hear people call for government to stay out of the broadcasting business. Broadcasting as we know it would not exist were it not for government involvement in assigning exclusive use of portions of the public airwaves and enforcing those rights against any encroachers. By contrast, newspapers don't rely on the exclusive use of public property to provide service. If the government owned all of the printing presses in the country and gave them out on an exclusive basis to certain selected citizens, the analogy to broadcasting would be more accurate.

This government-created system permits the government to impose fiduciary duties on broadcasters that it could not impose on newspapers under the First Amendment. Let me quote again from *Red Lion*:

> [A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are

> representative of his community and present those views which would otherwise, by necessity, be barred from the airwaves.(4)

In other words, no one has a First Amendment right to monopolize a broadcast frequency. Unlike newspaper owners, every broadcaster knows going in that his ability to pursue his private interests are constrained by the obligation to serve the public interest.

Well, those who would overturn *Red Lion* would fire back, the spectrum is only scarce because we're giving it away. It's a matter of economics. If we sold off the spectrum with no strings attached, then supply and demand could come into equilibrium and we wouldn't have more people asking for licenses than there were licenses to assign. True enough. Purely as an economic matter, you might be able to solve the scarcity problem by privatizing the airwaves. For those who would make this argument, I have just one suggestion -- run for Congress. Your system may work but it's not the one we have. So far, our elected representatives have opted for a different path: give licensees free and exclusive use of the broadcast spectrum but demand that they operate for the benefit of all those who were necessarily excluded.

True, we will now be auctioning off certain new broadcast licenses where competing applications are filed. But for the foreseeable future the vast majority of broadcasters will be operating with licenses for which the public did not receive a penny. Even for those new stations that obtain their licenses through an auction, their winning bids will have been discounted by the projected cost of fulfilling their fiduciary obligation to serve the public interest.

So I believe the notion of scarcity in *Red Lion* is still fully supportable. Some day, technology may solve the physical limitations of the broadcast spectrum, but we're nowhere near that point today. On the other hand, if it's time for a reassessment, a good place to start might be to repudiate the overreaching dicta about scarcity in *Syracuse Peace Council*.

On a broader level, though, I think scarcity is a red herring. Those who oppose imposing any special obligations on broadcasters have focused on scarcity as if it were the only possible ground for treating broadcasters differently. There are other grounds that I believe need to be explored. One idea rests on the public forum doctrine. The basic argument is that broadcasters have been given the exclusive use of a valuable piece of public property -- spectrum (including billions of dollars worth of additional spectrum to convert to digital). Under this theory, the government would be permitted to impose certain restrictions on broadcasters as long as they are reasonable and viewpoint neutral. Another idea argues that the First Amendment is designed to promote a robust and open debate on issues of public concern, and that the government can and should play an active role in ensuring that a diversity of viewpoints are presented on the public airwaves.

Another idea that resonates with me is that broadcasters have voluntarily entered into a binding deal with the public -- a *quid pro quo*, if you will. They get special benefits that newspapers don't get, like free spectrum and must-carry rights. In exchange, they have special obligations that newspapers don't have, like serving the public interest. Congress set the original parameters of the deal almost seventy years ago and has stuck with it ever since. Let me read a quote from an opinion by Warren Burger, certainly no raving liberal, prior to his appointment as Chief Justice:

> A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at

> the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.(5)

Sometimes, I wish broadcasters would make up their minds whether they'd like to be special or not. I've seen some of them shift back and forth on this, sometimes on the same day. When they come in to talk about one of the special benefits of being a broadcaster, like must-carry, I hear that free, over-the-air broadcasting provides a unique public service that requires special government protection. Then, when they come in to talk about one of the obligations of being a broadcaster, suddenly the specialness is gone. Now broadcasters are being unfairly singled out for disparate treatment because the public has access to so many similar services that don't have similar burdens. It's enough to give you lobbying whiplash.

For the record, I think that broadcasting is special. I'm all for giving broadcasters special benefits in exchange for special obligations. But it must be a two-way street. If the public is not entitled to ask anything from broadcasters, why do we keep doling out the preferential benefits? What's the justification for free spectrum? What's the justification for must-carry?

For me, it's a package deal. Either broadcasters are special or they're not. They can't have it both ways.

Of course, that won't stop some from trying. One clever approach is to say that of course broadcasters have a public interest obligation, but then to deprive that term of any real meaning. Under this view, the public interest is "that which interests the public," and since broadcasters are in the business of maximizing their market share, their actions almost by definition serve the public interest. In other words, the government gave away billions of dollars worth of spectrum in exchange for a promise to do exactly what every broadcaster would have done anyway. Some bargain. I know some people don't think much of government's competence, but I can't imagine government being that inept. It also assumes that Congress puts meaningless requirements in statutes. After all, if every broadcaster's private interests always served the public interest, Congress didn't have to say a word.

So what then do we make of the public interest standard? It's a difficult question and one I've struggled with. Let me give you my current thinking.

First, the public interest standard is broad. Wisely, Congress didn't attempt to catalogue what it means to serve the "public interest." Instead, as the Supreme Court has repeatedly held, Congress gave the Commission broad and flexible authority to define the public interest as technology and the needs of the public change.

Second, the public interest standard should be a "safety net" to protect the public against those broadcasters who might be tempted to violate their fiduciary duty in the absence of a rule. The fact that many broadcasters may already be fulfilling their public interest obligations does not make the standard unnecessary. It's like speeding. Most people may drive at a safe speed regardless of whether there is a speed limit or not. Once a speed limit is in effect, however, more people will drive at a safe speed. And if drivers know that there's a policeman in the area watching for speeders, the incidence of unsafe driving may fall to almost zero. The public interest standard is the speed limit on the public airwaves. Most broadcasters may voluntarily comply with these limits, even though they know that the FCC hasn't been handing out many speeding tickets lately. It's the lead-footed broadcasters who don't take their public interest obligations seriously that we should be concerned about.

Third, the public interest standard should be applied to *every* broadcast station, not to the industry as a

whole. If it's the bad actors that we're concerned about, those broadcasters should not be able to piggy back on the efforts of others.

Fourth, the public interest standard should protect and enrich our children. The average child watches 25-28 hours of television a week. There is no doubt that television exerts a great influence on their development and well-being. We must do what we can to protect our children from material that may harm them and to ensure that they have access to programming that meets their particular needs.

Fifth, the public interest standard should promote an open and robust debate on issues of public concern. As the Supreme Court has said on more than one occasion, "speech concerning public affairs . . . is the essence of self-government."(6) Let me quote (for the last time, I promise) from *Red Lion*:

> The people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or the FCC.(7)

The importance of television to the democratic process cannot be overstated. Indeed, just a few days ago, the Supreme Court noted that a majority of Americans rely on television as their primary source of electoral information.(8)

Sixth, the public interest standard does not countenance censorship. I do not want the government to decide which views I can and cannot hear. But I believe it is fully consistent with the First Amendment -- indeed, I believe that it promotes First Amendment values -- for the public to be exposed to a wide range of views on issues of public concern. I think that the public is always better served when it hears different viewpoints than when it hears only one side of the story, whether that one side is the government's or the broadcaster's.

In my mind, television is therefore much more than a toaster with pictures, and radio is much more than a toaster with sound. They educate us, entertain us and shape our future. Most broadcasters do a good job of serving the public interest. But it would be nothing short of miraculous if they *all* did. We owe it to the public, and we owe it to those broadcasters who are unfairly carrying the full load, to better define and enforce the public interest standard. And we should not be deterred in this critical task by those who would use specious constitutional arguments to try and block the way.

---

1. *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 388 (1969).

2. *Red Lion*, 395 U.S. at 392.

3. S. Rep. No. 227, 101st Cong., 1st Sess. 10-16 (1989); H. Rep. No. 385, 101st Cong. 1st Sess. 8-12 (1989).

4. *Red Lion*, 395 U.S. at 389.

5. *Office of Communication of the United Church of Christ*, 359 F.2d 994, 1003 (D.C. Cir. 1966). *See also CBS v. FCC*, 453 U.S. 367 (1981).

6. *CBS v. FCC*, 453 U.S. 367, 395 (1981), quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

7. *Red Lion*, 395 U.S. at 389-90 (citations omitted).

8. *Arkansas Educational Television Commission v. Forbes*.